that nothing herein shall permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or perishable freight.

There is nothing in the report of the principal case to show whether the cause of action arose before or after the adoption of the Act of April 14, 1910. Prior to the Act of April 22, 1908 (35 Stat. at L. 65, chap. 148) the carrier had a defense where the contributory negligence of the party injured was the proximate cause of the injury. That Act took away the defense of contributory negligence in all cases where a violation of the Safety Appliance Act contributed to the injury. If the cause of action arose before April 14, 1910, defendant would not be absolutely liable for the personal injury unless the movement of the car was in violation of the Safety Appliance Act, and it would not be in violation of the act unless the case can be distinguished from the case of *United States* v. *Louisville & N. R. R. Co.*, before cited. If that distinction can be made, the movement of the car would yet not be in violation of the Act unless the violation consisted in moving the defective car at the same time that the good car was being taken to the yard for general use. It seems that the holding must be supported on the ground that the good car was then in commercial use and that the movement of the defective car was not wholly excluded from the movement of another car in commercial use. If the cause of action arose after April 14, 1910, defendant would be liable for the personal injury at all events, because the movement of the car would be at defendant's sole risk. This would be true whether it was in violation of the former Safety Appliance Acts or not, but under the Act of 1910 the movement of the defective car was not in violation of the Act unless the car to which it was being fastened was being commercially used. It must be noted that the action was for damages for the personal injury and was not an action for the penalty for the violation of the Act.

The decision is probably correct, but it is certainly an extreme application of the Safety Appliance Acts. J. J. K.

ADVISORY OPINIONS;—The Privy Council, in an appealed case from the Supreme Court of Canada, was called upon recently to determine the constitutionality of an act of the Dominion Parliament which required the judges of the Supreme Court to give advisory opinions upon request of the Governor-General. *Attorney General for Ontario,* v. *Attorney General for Dominion of Canada* [1912] A. C. 571. The BRITISH NORTH AMERICA ACT of 1867 St. of C. 1867, granted Canada political autonomy with defined powers for the executive, legislative and judicial departments. The authority to demand advisory opinion was not expressly given in the constitution, but §91 invested in the Dominion Parliament the duty of making laws for the peace, order and good government of Canada, and §101 authorized the establishment of the Supreme Court. Under these two sections Parliament enacted in 1875 the SUPREME COURT ACT OF CANADA, 38 Vict. c. 11, which was in substance, re-enacted, R. S. C. 1906 c. 139. By §60 of this act the governor in council was given authority to submit questions of law or fact to the Supreme

Court judges, who were required to answer the same, and, in accordance with this provision, questions of law were submitted relative to the incorporation of companies within the Dominion. The Provinces objected to the Court answering the question on the ground that the law requiring advisory opinions was unconstitutional. The Appellate Court in affirming the decision of the Supreme Court of Canada that the statute was constitutional, based its opinion upon two grounds: first, that since 1875 the judges had on many occasions given advisory opinions under this statute, the validity of which had never before been questioned; second, that nearly all the Canadian Provinces had enacted laws requiring their courts to answer questions not in litigation, in terms similar to that act which they seek to impugn. The Court's reasons are amply supported by authority; *In re County Courts of British Columbia,* 21 Can. S. C. R. 446; *In re Crim. Code,* 27 Can. S. C. R. 461; *In re legislation relating to Labor on Sunday,* 35 Can. S. C. R. 581; *Grand Trunk Pacific Railway* v. *Rex* [1912] A. C. 204; REV. ST. OF NOVA SCOTIA, Vol. 2, c. 166, p. 709; REV. ST. OF ONTARIO, 1897, c 84; REV. ST. OF QUEBEC, 1909, vol. 1 Art. 579-83; REV. ST. OF MANITOBA 1902, c. 33. But the reasons given for the conclusion reached are decidedly unsatisfactory, as they are evasive and leave the real question unsettled as to its merits. If the Court's ruling is to be sustained the logical ground for its opinion is found in the position which advisory opinions obtain in England, and in an interpretation of the Canadian Constitution, which is, "to be a constitution similar in principle to that of the United Kingdom", as the preamble of the British North American act provides.

The practice of demanding advisory or consultative opinions by the crown and Parliament dates from the reign of Richard II. THAYER'S CASES ON CONST. LAW, 175. Some doubt existed for a period as to the right to exact opinions of the judges, and in Henry VII's reign, the court declined to answer questions put by the crown, *Fortescue* 384. And Lord COKE expressed his disapproval of the practice and doubted the king's right to demand extra-judicial opinions. *Peachman's Case,* 2 How. St. Tr. 871; 3 Inst. 2930; HARGRAVE'S NOTES, Co. LIT. 110 a, n. 129; FOSTER, CROWN LAW, 200. But since the reign of the Stuarts, the practice of the crown asking for advisory opinions has been very much in evidence. *Fenwick's Case,* Fortescue 385; *Paty's Case,* 14 East 92, note, 14 Howard St. Tr. 861, note; *Lord Geo. Sackville's case,* 2 Eden 371; and numerous other cases reported in Fortescue 382 et seq. But no opinion has been directly exacted from the judges by the crown since *Sackville's Case* in 1760. THAYER, LEGAL ESSAYS, 46. This is accounted for, in part, at least, by § 4 of 3 & 4 William IV, c. 41, which makes it incumbent upon the judiciary committee to advise the crown on all matters submitted. 9 Moo. P. C. 1, 12. Although the practice of the crown demanding advisory opinions has fallen into disuse, that power is still exercised by the House of Lords, and if any doubt as to the propriety of the right was manifested in *In Re The London and Westminister Bank,* 1 Bing. N. Cas. 197, 2 Cl. & F. 191, 1 Scott 4, where the judges declined to give an opinion owing to the ambiguity of the question, it was removed in *McNaughton's case.* 10 Cl. & F. 200 where in reply to Justice MAULE'S protest that "such preconceived

opinions might embarrass the administration of justice when the case actually arose", the Lords unanimously expressed judgement that it was proper and in order for the judges to answer hypothetical questions, and they have done so. *O'Connell's case,* 11 Cl. & F. 155; *Trial of Earl of Russell,* (1901) A. C. 446, 449; *Queen's Case,* 2 Brod. & Bing 284.

In contrast with the English view, are found the decisions in this country, in the absence of constitutional provision requiring advisory opinion. The question arose in 1793 when President WASHINGTON sought the advice of the judges of the Supreme Court on certain questions arising out of the Treaty with France. The judges declined to give an opinion on the ground "that the Court could be called upon only to decide controversies brought before them in legal form, and are bound to abstain from any extra-judicial opinion on any points of law, even though solemnly requested by the executive," STORY, CONST. § 1571, note. In 1792 Congress attempted to impose upon the courts the duty of determining what persons were entitled to pensions. The judges refused to act and enunciated the doctrine that the departments of the government are distinct and, "neither the legislature nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner",*Hayburn's case,* 2 Dall. (U. S.) 409, 410. This view has been uniformly followed in the Federal court, *Marbury* v. *Madison,* 1 Cranch 137; *Le Araba Silver Mining Company,* v. *U. S.,* 175 U. S. 423, 44 L. ed. 223; *U. S.* v. *Yale Todd* (note to *U. S.* v. *Ferriera*) 13 How. 52; *U. S.* v. *Ferriera,* 13 How. 40, 46;*Re Sanborn,* 148 U. S. 222, 37 L. ed. 429. "The judicial power is the right to determine actual controversies arising between adverse litigants duly instituted in courts of proper jurisdiction", *Muskrat et al.* v. *U. S.* 219 U. S. 346. In *In re Gordon* v. *U. S.,* 117 U. S. 697, the Court stated, "When Congress attempts either directly or indirectly to ask for an opinion of the federal courts, it asks for that which the Constitution does not provide, which its manner of construction does not warrant, which the spirit and theory of our government do not agree. And on this, the Courts have always agreed".

The subject of advisory opinions has been dealt with in various ways by our state governments. Seven states have constitutional provisions requiring such opinions. Massachusetts, incorporating a provision in its constitution in 1780, was the first state. It allows either branch of the legislature or the governor to exact opinions of the justices of the Supreme Court upon questions of law and on solemn occasions. In *Opinion of the Justices,* 126 Mass. 557, 61, the Court commented, "The introduction of this section had in view the usage of the English constitution by which the king as well as the House of Lords had a right to demand the opinion of the twelve judges of England". New Hampshire, 1784, and Maine, 1820, adopted the Massachusetts clause in their constitutions. The following states have adopted provisions which differ but slightly from the Massachusetts form, Rhode Island, 1842, Florida 1868, amended 1875; Colorado, 1886, South Dakota 1889, and the Hawaiian Islands, 1887, Art. 705. Haw. 716. Missouri's constitution of 1865 contained such provision, but the attitude of the court toward it, as expressed in *Judge's Opinion,* 37 Mo. 135; *Matters of North Mo. Railroad,* 51 Mo. 586;

Opinion of Court, 55 Mo. 497; *Opinion of Court,* 58 Mo. 369; caused it to be omitted in 1875.

In the absence of Constitutional provisions some states have enacted statutes requiring opinions of the courts, REV. ST. OF VERMONT, (1906), § 1341; *Opinion of Judges,* 37 Vermont, 665; REV. CODE OF DELAWARE, (1893), c. 27, § 4. The NEW YORK CODE OF CRIM. PROC., § 493, 94, permits the governor to exact opinions in certain criminal cases, 1 Denio 614. Oklahoma has a similar statute, SNYDER'S REV. ST. OKLA., §§ 6927-9. In *Opinion of* Judges, 118 Pac. 156, and in *Opinion of Judges,* 105 Pac. 684, the court refused to consider the constitutionality of the act.

The courts of Kentucky and Nebraska have given advisory opinions upon request in the absence of both constitutional and statutory provisions. *Opinion of Judges,* 79 Ky. 621; *In re Board of Sinking Fund Commissioners,* 32 S. W. 414, (Ky.) *In re School Fund,* 15 Neb. 684; *In re Babcock,* 21 Neb. 500; *Opinion of Judges,* 37 Neb. 425, 55 N. W. 1092, see dissenting opinion on constitutional grounds; and in *State* v. *Fleming,* 70 Neb. 523, 29, 97 N. W. 1063, the court seems to have overruled the previous Nebraska cases.

While in some jurisdictions advisory opinions are given in the absence of constitutional provision, the better accepted rule in this country is contrary to that doctrine, COOLEY, CONST. LIMIT. 72; STORY, CONST., § 1571. A statute authorizing such opinions is unconstituional because it imposes duties not judicial, *Matters of Senate,* 10 Minn. 56; *Rice* v. *Austin,* 19 Minn. 103, 107; *County Treasurer* v. *Dike,* 20 Minn. 363, 66; *State* v. *Baughman,* 38 Ohio St. 455, 59. Such opinions interfere with unbiased judgment, *Judges' Reply,* 33 Conn. 586. But where advisory opinions are permitted, we are in accord with the English view that they are merely advisory and not final, *Head* v. *Head,* 1 Turn. and R. 136, 40; *Beckman* v. *Maplesden,* O. Bridg. 60, 78; *Lord Geo. Sackville's case, supra;* THAYER, LEGAL ESSAYS, 46; 7 HARV. L. REV. 129, 153; 9 MICH. L. REV. 607; 24 AM. L. REV. 369. Though in Colorado the opinions are considered authoritative judgments, *In Matter of Senate,* 12 Colo. 466; and possibly Maine, 70 Me. 570, 83, but *Opinion of Judges,* 95 Me. 572, 3, seems to over-rule that idea.

That the English courts should establish a different rule than that which prevails in this country, as to the constitutionality of advisory opinions under a written constitution, can be accounted for by the different forms of government which exist in the respective countries. The theory of our government is based upon three co-ordinate departments, all equal, but independent and supreme in its particular sphere, as defined by a written constitution, 9 MICH. L. REV. 607. While in England Parliament is supreme and may exercise all the powers of the government, COOLEY, CONST. LIMIT. (7th ed.) 124. Consequently the judiciary is a subordinate department, and being accustomed to a supreme legislative department, the court's tendency would be to give the widest latitude to Parliamentary acts, and construe very strictly any written document which tends to curb the powers of the legislative department. But in the absence of experience with written constitutions, it would not have been amiss for the court to have looked at decisions in those countries where written constitutions prevail, as a guide in its interpretation of

the Canadian constitution. As Justice IDINGTON stated in a dissenting opinion when the principal case was in the Supreme Court of Canada, "I think we can, in arriving at the true interpretation of our BRITISH NORTH AMERICA ACT, especially on questions of this kind, receive most useful lessons both of instruction and warning from the experiences of that country (the United States), and from many of its master minds that have dealt with the solving of such problems as are now presented to us." *In re References by the Governor General and Council,* 43 Can. S. C. R. 536, 79. S. H. M.

REFUSAL OF SPECIFIC PERFORMANCE WHERE SUBSEQUENT UNEXPECTED EVENTS RENDER IT INEQUITABLE.—In the recent case of *Tazewell Coal & Iron Co.* v. *Gillespie,* 75 S. E. 757, the Supreme Court of Virginia refused to execute specifically a contract for the sale of lands on the ground that it would result in undue hardship and injustice to the defendants.

One statement of the rule of law in such cases, which will be found in many opinions, is that the fairness of a contract is to be judged according to the situation which existed when the contract was made. This statement is too broad, for it includes in its operation not only cases where the subsequent situation working hardship to one party should reasonably have been contemplated, but also cases where it should not. No court would now contend that the rule holds good to that extent. POMEROY, EQ. REM., § 797, 798; *King* v. *Raab,* 123 Ia. 632; *Pingle* v. *Conner,* 66 Mich. 187.

Another expression often indulged in by the courts in cases of the kind under discussion is that specific performance lies in the discretion of the court and will be refused where conditions have so changed since the date of making the contract as to work hardship or loss to parties not censurable in conduct. This statement is erroneous and misleading in two respects. First, it leads one to presume that a court of equity can do just as it pleases about granting specific performance, whereas this is conceded by all authorities to be untrue. FIELD, J., in *Willard* v. *Tayloe,* 8 Wall 557, makes use of this language, "This discretion is not an arbitrary or capricious one depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity." See also *White* v. *Damon,* 7 Ves. 35. (Lord Eldon). Second, the statement under discussion makes the hardship to the defendant in the suit for specific performance the sole test. This clearly renders immaterial any question as to whether the contract was fair when made. But numberless authorities could be cited in which mere inadequacy of consideration, apart from other inequitable circumstances, is held to be no bar to specific performance, whether the inadequacy existed when the contract was made or arose afterward by a change in the value of the subject matter of the contract. POMEROY, EQ. REM., § 797; 36 CYC. 616; *Cathcart* v. *Robinson,* 5 Pet. 264; *Cady* v. *Gale,* 5 W. Va. 547. In other words there are, contrary to the purport of this rule, cases in which the fundamental question is, was the contract fair when made.

From what has just been said it should be clear that neither the "hardship" test nor that of "fairness of the contract when made" has any practical value as a criterion for deciding cases. The "hardship" test unduly empha-